The UNIDROIT Principles as global background law

Ralf Michaels*

Abstract

After twenty years of existence, it becomes apparent that the role actually played by the UNIDROIT Principles of International Commercial Contracts (PICC) is quite different from the one originally intended. This article first presents nine surprising findings concerning the actual use of the PICC, as it can be assessed on the basis of published opinions, legislation, and scholarship. It then uses these findings to suggest that the PICC should not be viewed as a code or even a non-state law. Instead, their nature is that of a Restatement of global general contract law, and their function is that of a global background law. The article finally discusses implications of these findings for concrete questions: their use in private international law, their use to interpret the CISG, their relationship with other non-State codifications, and their relationship with a possible global commercial code.

Keywords: UNIDROIT Principles of International Commercial Contracts, background law, restatement, Global commercial code, global law

I. Introduction

The International Institute for the Unification of Private Law's (UNIDROIT) Principles of International Commercial Contracts (PICC) turn twenty.[1] For their authors, this is certainly a reason to celebrate, as it is for UNIDROIT as an institution. For the rest of us, the anniversary is an occasion to assess, as objectively as possible, what role the PICC have come to play in the contemporary legal landscape and what this tells us about the state of transnational law. That the PICC do play a role is obvious—not just from the numerous publications but also from numerous references in arbitral and judicial decisions and legislative projects. However, what this role is exactly remains somewhat opaque. The task of

* Ralf Michaels, Arthur Larson Professor of Law, Duke University. Email: michaels@law.duke.edu. Earlier versions of this article were presented at conferences at McGill University and UNIDROIT in Rome; I am grateful to inviters and participants. Thanks also to Diana Schawlowki for drafting a translation of my article referenced in n 5 below, from which a couple of passages were adapted.

[1] International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (3rd edn, Transnational 2010) [PICC].

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assessing their actual role is not made easier by the fact that much scholarship still rehashes the plethora of purposes the PICC see for themselves in their preamble[2] and shows little interest in either empirical findings as to actual use or theoretical and analytical analyses as to what the actual use tells us about the role the PICC play.

In this contribution, I first want to assess, as objectively as possible, where the PICC have played a role and where they have not. Insofar as judicial and arbitral practice are concerned, the picture can be derived, with fairly acceptable accuracy, from the UNILEX information database. Although that database is not complete,[3] it remains the most comprehensive, and best structured, collection of opinions referring to the PICC. As concerns their influence on legislation, both domestic and international, a similar database does not exist, nor am I aware of comprehensive scholarship, but my own research shows tentative results as well. I draw on materials collected for, and referenced in, the forthcoming commentary on the preamble on the PICC.[4] Whereas that contribution follows the structure of the preamble of the PICC and is as comprehensive as possible, in this article I want to focus especially on nine surprising findings that emerge.

Second, I use these synthetic insights towards a concrete goal, namely to determine analytically what role the PICC play in the contemporary legal landscape. I suggest that attempts to characterize the PICC as a non-State code, or even a non-State legal system—for example, a new *lex mercatoria*—are ill-fated, not just theoretically but also empirically. Instead, I find that their *nature* is that of a *restatement of global general contract law* and their *function* is that of a *global background law*.[5] I also ask what this means for the current state of transnational law.

[2] The current text of the Preamble is as follows:
(Purpose of the Principles)
These Principles set forth general rules for international commercial contracts.
They shall be applied when the parties have agreed that their contract be governed by them.
They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
They may be applied when the parties have not chosen any law to govern their contract.
They may be used to interpret or supplement international uniform law instruments.
They may be used to interpret or supplement domestic law.
They may serve as a model for national and international legislators.

[3] See the discussion below in part II.4.

[4] Ralf Michaels, 'Preamble I: Purposes, Legal Nature, and Scope of the PICC; Applicability by Courts; Use of the PICC for the Purpose of Interpretation and Supplementation and as a Model' in S Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts, 2010* (2nd edn, Edward Elgar 2015); for use in arbitration, see Michael Scherer, 'Preamble II: The Use of the PICC in Arbitration' in ibid.

[5] Thus, first in the first edition of my contribution in n 4 of this article and in Ralf Michaels, 'Umdenken für die UNIDROIT-Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts' (2009) 73 RabelsZ 866; for approval, see, eg, Stefan Vogenauer, 'Interpretation of the UNIDROIT Principles of International Commercial Contracts by National Courts' in Henk Snijder and Stefan Vogenauer (eds), *Content and Meaning of National Law in the Context of Transnational Law* (Sellier 2009) 157, 164; Stefan Vogenauer, 'Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition or Overkill of Soft Law?' (2010) 6 European Review of Contract Law 143; Nils Jansen, *The Making of Legal Authority* (Oxford University Press 2010) 42; Michael Joachim Bonell and Ole Lando, 'Future Prospects of the Unification of Contract Law in Europe and Worldwide' (2013) 18 *Uniform Law Review* 17, 23 (Bonell).

Finally, I suggest some concrete implications for currently relevant questions that emerge from this determination. These implications concern their use in private international law, their use to interpret the UN Convention on Contracts for the International Sale of Goods[6] (CISG), their relationship with other non-State codifications, and their relationship with a possible global commercial code.

II. The actual uses made of the PICC: nine surprising findings

The PICC were originally drafted as a restatement of transnational contract law.[7] Their original function was, rather modestly, to serve as preparatory work towards a possible uniform code.[8] Yet once the text was coming together, its authors expanded on this function. The preamble of the PICC lists a whole plethora of possible purposes, and the list is not even exclusive.[9] With little exaggeration, it can be said that the PICC offer themselves for whatever use people want to make of them.

Nonetheless, the preamble suggests a certain hierarchy of such uses. At the top of this hierarchy certainly stands the application of the PICC as the law chosen by the parties, the only use marked as mandatory in the preamble ('shall be applied,' as opposed to 'may be applied'). At the bottom of this hierarchy stood, for a long time, the use for domestic purposes, particularly as a model for purely domestic contracts (the official comments suggest their model character insofar mainly for countries with undeveloped law for foreign economic relationships and countries after dramatic socio-political changes[10]). Their use for the interpretation and supplementation of domestic law was not even considered in their original version and was only added for the 2004 version.[11] Most scholarship has followed this hierarchy. While there are literally hundreds of publications dedicated to the question whether the PICC can be applied as the chosen law, studies of their role as a model for domestic law and for the supplementation of domestic law are comparably rare and confined, almost always, to the law of a specific domestic system.[12] And yet, surveying the practice of the first twenty years of their existence

[6] 19 ILM 668 (1980).

[7] See Stefan Vogenauer, 'Introduction' in Vogenauer (n 4) paras 12–13.

[8] On the genesis, see Vogenauer (n 7) paras 14–21.

[9] Preamble, Official Comment 6 ('other purposes'), introduced in 2003; see the discussion in UNIDROIT, *Report: Study L: Miscellaneous 25* (September 2003) paras 588 (Finn) and 593.

[10] Preamble, Official Comment 7.

[11] See discussion in UNIDROIT (n 9) paras 594 (Bonell) and 603; Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational 2005) 234 n 170.

[12] The only publication explicitly devoted to legislative reform in a comprehensive (though largely derivative) fashion that I am aware of is Christine M Whited, 'The UNIDROIT Principles of International Commercial Contracts: An Overview of Their Utility and the Role They Have Played in Reforming Domestic Contract Law Around the World' (2011) 18 ILSA *Journal of International and Comparative Law* 167. For scholarship dealing with the influence on specific legal systems, see the references in Michaels (n 4) 134–40, 156–67.

reveals that their main uses lie elsewhere, as the following sections make clear. I discuss nine counter-intuitive findings

1. Parties rarely choose the PICC

The PICC offer themselves to parties for a variety of purposes—not only as a chosen law but also as a model for contracts and as a checklist for contract drafting. In reality, however, it appears that parties make relatively little use of the PICC. Early studies suggested that the PICC were relatively unknown.[13] This appears to have changed, to some extent.[14] And yet, scholarly claims to the contrary notwithstanding, it seems that parties rarely use the PICC. They rarely use them as a model or checklist for drafting purposes except very occasionally.[15] Interestingly, the same is true for choice-of-law purposes. It is not surprising that parties rarely attempt to choose the PICC in contracts before State courts, given the near unanimous unwillingness of State courts to enforce such a choice.[16] However, we are told things are different in arbitration, where the PICC are regularly chosen. As far as can be determined, this is untrue.[17] At the time of writing, UNILEX lists only 19 arbitral decisions addressing applicability of the PICC as rules of law governing the contract in disputes before an arbitral tribunal, out of 186 arbitral decisions that mention the PICC.[18] Out of these 19, no more than four (!) concern matters in which the parties had chosen the PICC in their contract.[19] In two others, they were chosen in the terms of reference.[20] The vast majority are cases in which the PICC were chosen by the parties at the beginning of the arbitration, either at the suggestion of the arbitrator (three cases)[21] or

[13] For the United Kingdom, see, eg, Roy Goode, 'Insularity or Leadership? The Role of the United Kingdom in the Harmonisation of Commercial Law' (2001) 50 International and Comparative Law Quarterly 751, 764; Peter L Fitzgerald, 'The International Contracting Practices Survey Project' (2008) 27 *Journal of Law and Commerce* 1; for the USA, see Michael Wallace Gordon, 'Some Thoughts on the Receptiveness of Contract Rules in the CISG and UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges' (1998) 46 *American Journal of Comparative Law*, Supplement 361, 364–7.

[14] Vogenauer (n 7) para 49.

[15] Michaels (n 4) paras 168–73 with references.

[16] Ibid paras 58–77.

[17] See already Michaels (n 5) 870–2.

[18] UNILEX also lists one court decision, in which applicability of the PICC is only obiter dictum: *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch).

[19] International Chamber of Commerce (ICC) Award no 11880 (2004) <http://www.unilex.info/case.cfm?id=1427> accessed 21 October 2014; Tribunal of International Commercial Arbitration at the Ukrainian Chamber of Commerce and Trade, Arbitral Award (22 December 2004) <http://www.unilex.info/case.cfm?id=1099> accessed 21 October 2014; Centro de Arbitraje de México, Arbitral Award (30 November 2006) <http://www.unilex.info/case.cfm?id=1149> accessed 21 October 2014; Permanent Court of Arbitration, Arbitral Award (2009) <http://www.unilex.info/case.cfm?id=1473> accessed 21 October 2014.

[20] ICC Award no 8332 (December 1996) 1041 (in part), reprinted in (1999) 10(2) International Court of Arbitration Bulletin 65; ICC Award no 11739 (2002) <http://www.unilex.info/case.cfm?id=1687> accessed 21 October 2014 (apparently).

[21] Ad hoc Arbitration New York, Arbitral Award (no date) <http://www.unilex.info/case.cfm?id=994> accessed 21 October 2014; Arbitration Court of the Lausanne Chamber of

without such an explicit suggestion appearing from the abstract (10 cases).[22] Such a choice during the arbitral proceedings is hard to distinguish, in practice, from the case in which the arbitrator herself designates the PICC as applicable law in the absence of a party choice and then asks the parties for their agreement.[23]

Comparable numbers emerge from a recent analysis of previously unpublished decisions by the International Court of Arbitration. Here, the PICC were mentioned in only 54 proceedings or 0.8 per cent of all proceedings.[24] From another report, we learn that, between 2007 and 2011, the PICC were mentioned in contracts in only seven matters referred to arbitration under the International Chamber of Commerce (ICC), as opposed to 3,551 in which national law was chosen.[25] Considering that the ICC has generally been sympathetic to the PICC and has organized several symposia on them, this is a remarkably low figure.

2. *Adjudicators use the PICC even when they have not been chosen*

The result is rather startling. Were it only for the most-discussed use, namely application by party choice, the PICC could be considered nearly irrelevant to adjudication and arbitration. In fact, they are not irrelevant at all. However, their importance is due to their use not by parties but, rather, by judges and arbitrators, who do refer to the PICC with some frequency, even if only very rarely due to a choice by the parties. More frequent is the use of the PICC in situations where the parties referred to the *lex mercatoria*, general trade customs,

Commerce and Industry, Arbitral Award (31 January 2003) <http://www.unilex.info/case.cfm?id=862> accessed 21 October 2014; ICC Award no 12889 (2004) <http://www.unilex.info/-case.cfm?id=1398> accessed 21 October 2014.

[22] Camera arbitrale nazionale ed internazionale di Milano, Arbitral Award (1 December 1996) <http://www.unilex.info/case.cfm?id=622> accessed 21 October, 2014; International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Award no 116 (20 January 1997); Ad hoc Arbitration Paris, Arbitral Award (21 April 1997) <http://www.unilex.info/case.cfm?id=651> accessed 21 October 2014; ICC Award no 10114 (March 2000) <http://www.unilex.info/case.cfm?id=696> accessed 21 October 2014; ICC Award no 10865 (2002) <http://www.unilex.info/case.cfm?id=1397> accessed 21 October 2014; ICC Award no 11174 (2002) <http://www.unilex.info/case.cfm?id=1399> accessed 21 October 2014; Arbitration Court of the Lausanne Chamber of Commerce and Industry, Arbitral Award (25 January 2002) <http://www.unilex.info/case.cfm?id=863> accessed 21 October 2014; Arbitration Court of the Lausanne Chamber of Commerce and Industry, Arbitral Award (17 May 2002) <http://www.unilex.info/case.cfm?id=861> accessed 21 October 2014; International Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Award no 166/2012 (25 May 2013) <http://www.unilex.info/case.cfm?id=1791> accessed 21 October 2014; International Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation, Award no 233/2012 (3 October 2013) <http://www.unilex.info/case.cfm?id=1793> accessed 21 October 2014.

[23] Similarly Emmanuel Jolivet, 'L'harmonisation du droit OHADA des contrats: L'influence des Principes d'UNIDROIT en matière de pratique contractuelle et d'arbitrage' (2008) 13 *Uniform Law Review* 127, 129.

[24] Jolivet (n 23) 129. In eleven of these proceedings, application of the PICC was rejected. Ibid 130.

[25] Jason Fry, Simon Greenberg, and Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (ICC 2012) para 3-761.

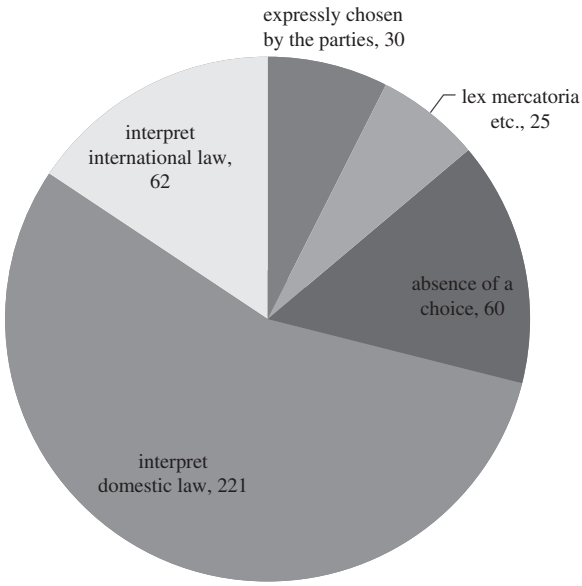

Figure 1. Adjudicatory and arbitral uses of the PICC by type of application

or the like. Yet more frequently they are referred to in the absence of party choice. By far the biggest portion of decisions are those, however, in which the PICC are used for the interpretation and supplementation of international law and, even more frequently, domestic law (Figure 1). While their use for the interpretation and supplementation of international commercial law is still in line with their original purpose, their use in the context of domestic law may seem surprising.

Note also that in many of these situations the PICC will be only one of many legal texts used by adjudicators. A typical example is a recent decision by the Spanish Supreme Court, which cited, for principles of contract interpretation, not just Article 4.1 of the PICC but also Article 236 of the Portuguese Civil Code, Article 1156 of the French Code Civil, Article 1362 of the Italian Civil Code, and Article 5:101 of the Principles of European Contract Law (PECL).[26] The PICC are here not a source, but an element, in a broad comparative survey. Such use is different from their use as the applicable law, which would, in principle, happen with the exclusion of other legal systems. In other words, the PICC do not become 'the' applicable law but, rather, one of several bodies of legal rules on which adjudicators draw—no more but also no less.

[26] Tribunal Supremo, Case no 74/2012 (29 February 2012) <http://www.unilex.info/case.cfm?id=1652> accessed 21 October 2014, para 27. PECL refers to Ole Lando and others (eds), *Principles of European Contract Law*, parts 1 and 2 (Kluwer Law International 2003) (PECL).

3. The PICC are increasingly used as customs or international trade usage

Another more recent use has not yet been analysed sufficiently in scholarship. With increasing frequency, the PICC are used as trade usages, customs, or the like. In some systems, the PICC are even officially viewed in their entirety as an expression of business customs. This has happened in Ukraine, after the Supreme Economic Court, in 2008, issued a letter entitled 'On Some Issues in the Application of the Civil and Commercial Codes of Ukraine', which established that the PICC, among other texts, can be viewed as an expression of business custom.[27] Since then, Ukrainian courts have referred to the PICC in at least 34 cases.[28] Similarly, courts in China have referred to the PICC as custom.[29] Explicit reference is made to the PICC for determination of usages also in Article 31(3) of the International Trade Center's (ITC) Contractual Joint Venture Model Agreement (three parties or more)[30] and Article 23(3) of this same Agreement (two parties only).[31]

This use as customs is, at first sight, surprising. The PICC, properly understood, are largely not a restatement of such usages.[32] They draw, to a large extent, on official law and represent a universal restatement, whereas trade usage is typically unofficial and specific to a particular trade. If courts, especially in formerly socialist countries, draw on them regardless, it appears they use them as a hook to escape their overly restrictive domestic laws. This gives them a rather powerful role that would deserve further analysis.

4. State court judges apply the PICC as often as arbitrators

Focusing more closely on the use by adjudicators, it is interesting to distinguish between arbitrators, on the one hand, and State courts, on the other. One might expect the PICC to be used more and more (at least thus, we often read) and that they

[27] Letter of the Supreme Economic Court of Ukraine, *On Some Issues in the Application of the Civil and Commercial Code of Ukraine,* Doc 01-8/211 (7 April 2008) <http://pravo.ligazakon.ua/document/view/SD080085?edition=2008_04_07> accessed 21 October 2014 para 2.

[28] UNILEX lists 20 decisions; 34 can be found at <http://reyestr.court.gov.ua/> accessed 21 October 2014 (search for 'принципи УНІДРУА'). For possible use under the new Croatian law of obligations, see Antonija Zubović, 'Primjena Trgovačkih Običaja' (2006) 27 Zbornik Pravnog fakulteta Sveučilišta u Rijeci 307, 323–5.

[29] Jie Huang, 'Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation' (2008) *Manchester Journal of International Economic Law* 105, 135–6; P Leibküchler, 'Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China' [2013] Zeitschrift für Chinesisches Recht 89, 93 contra Yongping Xiao and Weidi Long, 'Contractual Party Autonomy in Chinese Private International Law' (2009) 11 Yearbook of Private International Law 193, 202.

[30] See International Trade Center (ITC), *UNCTAD/WTO, ITC Contractual Joint Venture Model Agreements* (ITC 2004) 7, 26.

[31] ITC (n 30) 65, 77. On both, see also Jean-Paul Vulliéty, 'Le contrat-type pour les Joint Ventures contractuelles du Centre du Commerce International au regard des Principes d'UNIDROIT et d'autres normes d'unification du droit des contrats' (2004) 9(2) *Uniform Law Review* 295.

[32] David Oser, *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?* (Martinus Nijhoff 2008) 80–1.

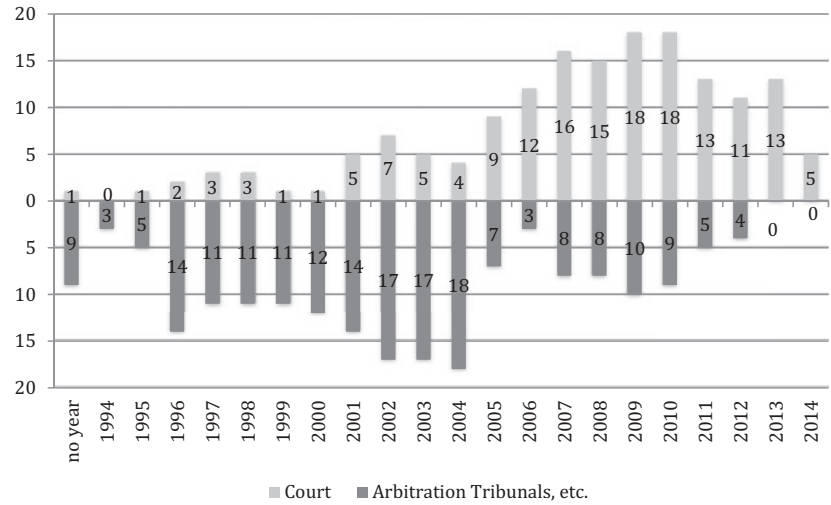

Figure 2. Number of decisions reported per year in courts and arbitration respectively

are mostly used by arbitrators. As far as can be ascertained, both expectations cannot be confirmed. First, at least according to UNILEX, the numbers of application seem to have settled somewhere between 15 and 30 per year—not insignificant numbers, but certainly not very high. These numbers must be taken with a grain of salt: decisions are certainly under-reported. For example, according to one author, in the first nine months of 2013 alone, six Spanish Supreme Court decisions and 65 (!) Spanish lower court decisions made reference to the PICC.[33] UNILEX lists one single Spanish judicial decision for the same time. Moreover, arbitral decisions are frequently unpublished. The total number of arbitral awards making reference to the PICC is therefore certainly higher (though nobody can say for sure by how much).

This high number of judicial opinions from Spain points to a second peculiarity. While we have no evidence for an increase in arbitral awards that use the PICC, we can clearly observe such an increase in judicial opinions. This emerges from the numbers on UNILEX (Figure 2). The effect is likely increased if we take into consideration that judicial opinions in Spain have apparently begun to reference the PICC only around 2006; a similar recent development can be observed in Ukraine.[34] By contrast, numbers from international arbitration seem to remain low. It has often been argued that a huge number of arbitral decisions using the PICC is simply hidden from view because arbitral decisions are usually unpublished. This does not appear very likely in view of developments in investment

[33] Pablo-Romero Gil-Delgado, 'Avances en la aplicación de los Principios UNIDROIT sobre los contratos comerciales internacionales: Cláusulas modelo para los contratantes' (2014) 6 Cuadernos de Derecho Transnacional 253, 260–1, n 27 and 28.

[34] See text accompanying notes 27–8 above.

arbitration (where decisions are regularly published). Although much has been written recently about the use of the PICC in investment arbitration,[35] we only know of a small handful of cases in which they have actually been used.

5. *The PICC are used very differently in different countries*

Another finding is interesting. The majority of decisions with a reference to the PICC come from a very small number of jurisdictions. At least according to UNILEX, courts in only 10 countries referred to the PICC in more than four decisions: Russia (25), Ukraine (21), Spain (20), Australia (13), China (13), Italy (12), Netherlands (11), United Kingdom (UK) (9), Argentina (6), and USA (5). At first, this list does not seem to follow a systematic pattern: the list contains three common law countries, four civil law countries, and three former socialist systems. A closer look reveals some commonalities within each group. It seems different factors are at stake for each of these three groups. Further research would be useful.

In the common law jurisdictions, a disproportionate number of the references concern only two issues. Seven of the Australian decisions deal with the general question of whether there is, or should be, a general principle of good faith as in Article 1.7 of the PICC or whether a clause requiring conduct to be in good faith can be enforced and what it implies.[36] Five UK decisions and two Australian decisions as well as three of the four reported decisions from New Zealand that refer to the PICC do so for a specific issue—namely whether pre-contractual negotiations can be used for the interpretation of a contract.[37] On both issues, the solution of the PICC is mostly rejected. The PICC are used, in other words, mostly as an anti-model rather than as a model. Still, what may look to be a failure for the PICC is actually a success—they are taken seriously, even if their solutions are rejected in the specific case.

No such limited use emerges from the case law of civil law courts. Instead, references are made to different specific rules from the PICC for comparative

[35] Michael Joachim Bonell, 'International Investment Contracts and General Contract Law: A Place for the UNIDROIT Principles of Commercial Contracts?' (2012) 17(1/2) *Uniform Law Review* 141; Giuditta Cordero Moss, 'Soft Law Codifications in the Area of Commercial Law' in Andrea K Bjorklund and August Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar 2012) 109; see also some of the other contributions in this volume of *Uniform Law Review*.

[36] *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151; *Alcatel Australia Ltd v Scarcella & Ors* (1998) 44 NSWLR 34; *Aiton v Transfield* [1999] NSWSC 996; *Central Exchange Ltd v Anaconda Nickel Ltd* (2002) 26 WAR 33; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd and Others* [2003] FCA 50; *United Group Rail Services v Rail Corporation of New South Wales* [2009] NSWCA 177; *Macquarie International Health Clinic Pty Ltd v. Sydney South West Area Health Service* [2010] NSWCA 268. See the detailed discussion in Stefan Vogenauer, 'Art 1.7' in Vogenauer (n 4) paras 22–5

[37] Australia: *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Limited* [2009] FCA 1220; *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407. United Kingdom: *Proforce Recruit Limited v The Rugby Group Limited* 2006 EWCA Civ 69; *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWCA Civ 1689; *Great Hill Equity Partners II LP v Novator One LP & Ors* [2007] EWHC 1210 (Comm); *Chartbrook Limited v Persimmon Homes Limited* [2008] EWCA Civ 183; [2009] UKHL 38. New Zealand: *Hideo Yoshimoto v Canterbury Golf International Limited* (2000) NZCA 350; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5; Divett v Skeates [2011] NZHC 707.

law purposes. The desire of judges seems to be to ascertain that a solution they find in domestic law is compatible with what is considered a global consensus. The PICC are not cited as applicable law nor are they usually the only source used, but their use is for the purpose of information and confirmation. Remarkably, such use is very frequent in some jurisdictions (for example, Spain) and virtually non-existent in others (for example, Germany). The reason might be that German lawyers are more confident in the self-sufficiency of their legal system than are Spanish lawyers, but this is mere conjecture. It seems more likely that this is a matter of chance, depending on whether the relevant legal actors at a certain time do or do not draw on the PICC.

The most interesting use, however, emerges from formerly socialist countries. In Ukraine, the PICC are regularly referred to as evidence of international custom, as was mentioned earlier in this article.[38] In Russia, a large number of recent decisions refer to Article 1.1 (freedom of contract).[39] Presumably, the PICC are used here less as evidence of actual international customs and more as a way to enable courts to transcend the limiting provisions of their domestic laws and, nonetheless, to rest their decisions on actual formulated legal rules.

6. Use as a system is rare and rarely successful

Moving on from who uses the PICC to how they are used, we find further unmet expectations. The PICC were drafted as a relatively comprehensive codification, but in reality they are rarely used in this way. There are two ways in which the PICC offer themselves in their entirety. The first of these is as the applicable law. Yet parties rarely choose the PICC as the explicable law, as was discussed earlier, and when adjudicators use them in the absence of a party choice, they rarely treat them as the applicable law either, as was seen before.

The second potential use of the PICC as a comprehensive code is as a model code. Here, success is decidedly mixed at best. Although the PICC are rarely ignored altogether in legislative projects,[40] they are rarely used in their entirety.[41] For example, the Civil Code of Lithuania, which famously draws in large measure on the PICC,[42] is still in most areas distinct. The same can be said about recent

[38] See n 21 above.

[39] A considerable number of decisions can be found at <http://base.consultant.ru/> accessed 21 October 2014. See also, more generally, AS Komarov, 'Reference to the UNIDROIT Principles in International Commercial Arbitration Practice in the Russian Federation' (2011) 16(3) *Uniform Law Review* 657.

[40] See the detailed references in Michaels (n 4) paras 156–167.

[41] For a parallel insight, see Sefan Vogenauer, 'The DCFR and the CESL as Models for Law Reform' in G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 732.

[42] T Žukas, 'Reception of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law in Lithuania' in E Cashin Ritaine and E Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (Schulthess 2007) 231, 238–9; T Žukas, *Einfluss der 'UNIDROIT Principles of International Commercial Contracts' und der 'Principles of European Contract Law' auf die Transformation des Vertragsrechts in Litauen* (Stämpfli 2011); V Šidlauskaitė and S Selelionytė, 'UNIDROIT ir europos sutarčiu teisės princip įtaka lietuvos' (2009) <http://vddb.library.lt/obj/LT-eLABa-0001:E.

legislative projects in Spain,[43] where the PICC figure prominently among the influences. The Scottish Law Commission referred to the PICC frequently in the 1990s and again since 2011 in the reform of domestic contract law, but always in very specific areas and not for every project.[44]

And where the PICC are used as a comprehensive model, the reform is not successful. The starkest example is the Organization for the Harmonization of Corporate Law in Africa's (OHADA) draft contract code.[45] Drafted by a Belgian scholar and modelled in large part on the PICC, the draft code was supported by UNIDROIT and discussed a lot (including in a large conference held in Ouagadougou in 2007).[46] At the moment, however, it seems to have been tabled. The reasons are not fully clear—they may have to do with insufficient sensitivities to African peculiarities,[47] difficulties between common law and civil law systems, or simply a lack of political will. Similarly unsuccessful has been a recent attempt by the Australian government to internationalize its contract law on the basis of the PICC.[48] Doubts have been mentioned considering the open-textured nature of their provisions,[49] the role of good faith,[50] and the need of

02~2009~D_20100224_103722-77547> accessed 21 October 2014; S Slelionytė-Drukteinienė, V Jurkevičius, and T Kadner Graziano, 'The Impact of the Comparative Method on Lithuanian Private Law' (2013) 21 European Review of Private Law 959, 975–7.

[43] Anselmo Martínez Cañellas, 'The Influence of the UNIDROIT Principles on the Proposal of the Reform of the Spanish Commercial Code' Cashin Ritaine et al (n 42 above) 215; C Jerez Delgado and MJ Pérez García, 'The General Codification Commission and the Modernisation of the Spanish Law of Obligations' [2011] Zeitschrift für Europäisches Privatrecht 601; Gobierno de España, Ministerio de Justicia, *Propuesta de Código Mercantil elaborada por la Sección de Derecho Mercantil de la Comisión General de Codificación* (2013) 44, 72, 78.

[44] *Discussion Paper 109 on Remedies for Breach of Contract* (April 1999); *Report on Interpretation in Private Law*, Scottish Law Communication no 160 (1997); *Report on Penalty Clauses*, Scottish Law Communication no 171 (1999); *Report on Remedies for Breach of Contract,* Scottish Law Communication no 174 (1999); *Discussion Paper on Interpretation of Contract,* Scottish Law Communication no 147 (2011); *Discussion Paper on Third Party Rights in Contract* (Scottish Law Communication no 157 (2014), all available at <http://www.scotlawcom.gov.uk/html/publications.html> accessed 21 October 2014; E Örücü, 'Legal Culture and Legal Transplants: The Scottish National Report' in JA Sánchez Cordero (ed), *Legal Culture and Legal Transplants: Reports to the XVIIIth International Congress of Comparative Law* (International Academy of Comparative Law 2011) 1002, 1023.

[45] Michaels (n 4) paras 149–51 with references.

[46] See the papers in (2008) 13 (1/2) *Uniform Law Review* 1-676.

[47] Brief discussion and references in Michaels (n 4) para 151.

[48] Australia, Attorney-General's Department, *The UNIDROIT Principles: Lessons for Australia?* (2012); Australia, Attorney-General's Department, *Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law*, Doc no 6.6 (2012) 19, both <http://www.ag.gov.au/consultations/pages/ReviewofAustraliancontractlaw.aspx> accessed 21 October 2014. See already P Finn, 'Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract' in M Hiscock and W van Caenegem (eds), *The Internationalisation of Law: Legislating, Decision-Making, Practice and Education* (Edward Elgar 2010) 145, esp 154–60.

[49] D Robertson, 'Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contracts' (2010) 17 *Australian Journal of International Law* 185, 192; cf Luke Nottage, 'Afterthoughts: International Commercial Contracts and Arbitration' (2010) 17 *Australian International Law Journal* 197, 203–4.

[50] A Stewart, 'What's Wrong with the Australian Law of Contract?' (2012) 29 *Journal of Contract Law* 74, 89. In favour of good faith, see Peter L Finn, 'The UNIDROIT Principles: An Australian Perspective' (2010) 17 *Australian International Law Journal* 193, 195–6.

consumer protection,[51] so the project went nowhere.[52] Finally, mention can be made of the idea of a global commercial code on the basis of the PICC, which has been proposed but never enacted.[53] These examples may be too few for generalization, but they do allow for one conclusion: So far at least the PICC have never served as a comprehensive model for any law reform. This finding suggests that the internal coherence and consistency for which the authors strove does not play a great role in practice.

7. Most use is made of individual provisions and in connection with other laws

Instead, the PICC play their main role where individual provisions are used. This is certainly the case in adjudication. Note that, in arbitration (and also in the Draft Hague Principles on Choice of Law in International Commercial Contracts (Hague Principles)), the PICC can be chosen only as 'rules of law' (the language of most arbitration legislation), not as 'law' (the language of most State rules on choice of law.[54] Often, 'rules of law' are understood to be nothing more than a placeholder term for a broader concept of law that includes non-State law. However, once we take the words 'rules of law' literally, we see that the difference between State courts and arbitration is that the latter allows for the choice not just of whole legal systems but also of individual rules. Indeed, this explains a core difference in the decision-making process, which is, in arbitration, more loosely based on one legal system.[55]

When we switch from the use of the PICC in the sense of private international law to the (more pertinent) supplementary use, this notion becomes even clearer. Mostly, adjudicators use individual provisions of the PICC. As it seems, a rule of the PICC is not applied or consulted because it is part of the generally applicable law or even because such reference to the PICC is generally expected. Instead, individual provisions are referred to because they seem of particular relevance or usefulness. Indeed, whereas a considerable number of provisions of the PICC seem to never have been used at all, other provisions find repeated use. Short of a systematic analysis of which provisions are the most successful, there appear to be two very different types of situations in which such use is made (with some

[51] L Spagnolo, 'Law Wars: Australian Contract Law Reform vs. CISG vs. CESL' (2013) 58 *Villanova Law Review* 623, 642–3.

[52] A draft code references the PICC extensively. MP Ellinghaus, D StL Kelly, and EW Wright, *A Draft Australian Law of Contract* (2014) <http://ssrn.com/abstract=2403603> accessed 21 October 2014.

[53] Michael Joachim Bonell, 'Do We Need a Global Commercial Code?' (2001) 106 *Dickinson Law Review* 87; Ole Lando, 'A Vision of a Future World Contract Law: Impact of European and UNIDROIT Contract Principles' (2004) UCC Law Journal 3; HD Gabriel, 'UNIDROIT Principles as a Source for Global Sales Law' (2013) 58 *Villanova Law Review* 661.

[54] Hague Principles on Choice of Law in International Commercial Contracts <http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf> accessed 21 October 2014.

[55] See G Kaufmann-Kohler, 'The Transnationalization of National Contract Law by the International Arbitrator' in M Kohen and D Bentolila (eds), *Mélanges en l'honneur du Professeur Jean-Michel Jacquet: Le droit des rapports internationaux économiques et privés* (LexisNexis 2013) 107.

overlap between them). The first is to support a general statement on the existence of a certain rule that permeates many legal systems, which can explain the frequent references to Articles 1.1 (freedom of contract) or Article 1.7 (good faith and fair dealing). A second frequent use of the provisions of the PICC is to concretize certain abstract principles. Articles 6.2.2 and 6.2.3 (hardship) and Article 7.4.9 (interests), for example, are frequently used because they provide adjudicators with very specific rules. Both uses are based on quite different justifications: for the first type, a provision invoked as a restatement of generally accepted rules; for the second type, in contrast, a provision used because of its superior quality.

Remarkably, we find the same phenomenon in legislation. Mostly, legislators draw on individual provisions. As in adjudication, influence exists for individual provisions—either because they represent a general trend or because they seem particularly successful. An additional insight matters. The PICC are never used exclusively. Instead, they are usually one of several models used. In one way, of course, this represents a great success for the PICC. They are, as a model, on the same level as binding laws, domestic or national. In another way, it represents a failure. If the PICC were once intended to make recourse to domestic law superfluous, they have not succeeded at this goal.

8. Adjudicators frequently apply the PICC to domestic situations

Another issue is whether the PICC are used predominantly internationally or nationally. They were conceived, at least according to their drafters, explicitly for international contracts (as becomes clear from their name). Domestic application, although never ruled out, was viewed as only tangential. Presumably, this restriction was inspired by the CISG, which unifies sales law only for international contracts, while leaving domestic law untouched. In reality, in regard to the PICC, no big difference in application can be seen between international and domestic situations. If anything, they are used more domestically than internationally.

In regard to adjudication, we already saw that the PICC are rarely applied as the applicable law, a consequence of private international law. Their main use is in the interpretation and supplementation of other law. Of course, this alone would not rule out their use for international contracts. When Chinese and Ukrainian courts apply the PICC as evidence of international trade usage, their (assumed) international character still shows. Beyond that, however, a surprising fact emerges. On the one hand, the PICC are not used as regularly for the interpretation of international contract law, as one might expect. Even their use for the CISG, for which they were specifically aimed, is often rejected, not infrequently with the rather formalistic argument that they cannot underlie the CISG because they are younger. On the other hand, not infrequently, they are used for the interpretation of domestic law in purely domestic situations. Most of the Spanish decisions reported concerned domestic matters, occasionally even domestic consumer contracts.[56] The same is true for the English decisions concerning the use of

[56] On theoretical compatibility of the PICC with consumer contracts, see Michaels (n 4) para 27.

pre-contractual negotiations for contract interpretations. The internationality of the PICC serves here as a backdrop—adjudicators are interested in knowing whether they are in accordance with views elsewhere.

9. The PICC are a model more for domestic than international law-making

The same is true, even more strongly, for legislation. The PICC have not, as might have been expected, become an important model for international legislation. Not only have suggestions to turn the PICC into a global commercial code not been heeded. The recent proposal for a global commercial code, proposed to the United Nations Commission on International Trade Law (UNCITRAL) by the Swiss delegation,[57] is largely independent of the PICC (presumably due to institutional competition between UNCITRAL and UNIDROIT) and also unlikely to succeed, not least in the face of firm opposition from the USA.[58] In European contract law, the PICC maintain their role as one inspiring model even besides the PICC, though they compete with other influences.[59] Other regional projects such as the proposed Principles of Asian Contract Law and a similar Latin American project are also not, as far as can be seen, based on the structure of the PICC.[60] At present, OHADA's contract code remains the only transnational project explicitly

[57] UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law,* UN Doc A/CN.9/758 (8 May 2012); for the views of one member from the Swiss delegation, see I Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58 *Villanova Law Review* 723; on the possible role of UNCITRAL in the elaboration of such a code, see R Sorieul, E Hatcher, and C Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58 *Villanova Law Review* 491, 497–9. In support J Ramberg, 'CISG and UPICC as the Basis for an International Convention on International Commercial Contracts' (2013) 58 *Villanova Law Review* 681, 690.

[58] K Loken, 'A New Global Initiative on Contract Law in UNCITRAL: Right Project, Right Forum?' (2013) 58 *Villanova Law Review* 508; MJ Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' (2014) 19 *Uniform Law Review* 114. Similarly HD Gabriel, 'UNIDROIT Principles as a Source for Global Sales Law' (n 53 above) 663–6. See also discussion about the *Report of United Nations Communication on International Trade*, 45th Session, UN Doc A/67/17 (25 June – 6 July 2012) paras 127–32.

[59] Michaels (n 4) 126. Martijn Hesselink helpfully enlightened me on this point.

[60] For the Asian Principles, see N Kanayama, 'PACL – The Significance and Task of PACL', (2010) 1406 Jurist 102 (in Japanese); see also N Kanayama <https://www.youtube.com/watch?v=DuVH-B9Bixc> accessed 21 October 2014; (2012) 4 *Asia Private Law Review Special*; S Han, 'Principles of Asian Contract Law: An Endeavour of Regional Harmonization of Contract Law in East Asia' (2013) 58 *Villanova Law Review* 589; Yeong-chin Su, 'Codification of Civil Law in East Asia: A General Report' in Wen-Yeu Wang (ed), *Codification in East Asia: Selected Papers from the Second IACL Thematic Conference* (Springer 2014) 181, 193–7; for the (apparently limited) model function of the PICC, see 193); Y-J Lee, *Principle [sic] of Asia Contract Law and the Future of Korean Contract Law* (2013) <http://www.kcjlaw.co.kr/download1.php?no=159&tb=sb051&PHPSESSID=9f644ce3aa88107b8477815a2f0ed03a> accessed 21 October 2014. For the Latin American project, see Proyecto de Principios Latinoamericanos de Derecho de los Contratos <http://fundacionfueyo.udp.cl/proyecto-sobre-principios-latinoamericanos-de-derecho-de-los-contratos> accessed 21 October 2014; C Pizarro Wilson (ed), *El derecho de los contratos en Latinoamérica: Bases para unos principios de derecho de los contratos* (Ediciones de la Fundación Fernando Fueyo Laneri 2012); C Eyzaguirre and J Rodríguez Diez, 'Expansion and Limits of Objective Good Faith: With Regard to the "Proyecto de Principios Latinoamericanos de Derecho de los Contratos"' (2013) 21 Revista Chilena de Derecho Privado 137.

based on the PICC. On the other hand, it is domestic legislators who habitually draw on the PICC for inspiration even for purely domestic projects. The new Cuban Law on Economic Contracts, which shows influence from the PICC, is even inapplicable to international contracts.[61]

10. Summing up: how the PICC are, and are not, used

Some preliminary insights follow from this overview. Quantitatively, the PICC have come to play a significant role in today's law—less so than is sometimes alleged by their supporters, but more so than would be apparent from a narrow perspective on situations in which the PICC are chosen as the applicable law in adjudication or arbitration. Their importance seems to have stabilized, more or less. In regard to the question which institutions use them, the most important role for the PICC is no longer, if it ever was, about party choice and arbitration. How important the PICC are today is hard to assess beyond hearsay because so many arbitral awards are still not made public. What can be said with certainty, however, is that the PICC play a role in legislative reform and academic debate all around the world, and they are referred to with some frequency by the courts of a number of countries.

Doctrinally, the PICC are rarely an 'applicable law' in the sense of private international law. Instead, they enter judicial opinion in a variety of other ways. The most important way is in the course of comparative legal argument for questions where judges do not find a clear and/or satisfying answer in their own legal system. In addition, they are referred to in other interesting contexts—most surprisingly, perhaps, as international custom or usage.

In regard to the nature of the PICC themselves, their importance does not lie in their (alleged) role as a non-State legal order—a system. Where the PICC offer themselves in their entirety—whether as a model for legislation, such as OHADA's contract code, or as a chosen law in arbitration—they are rarely successfully chosen. Their biggest influence, by contrast, comes when individual rules and issues are at stake. The PICC serve more as a reservoir for solutions than as a legal order. Finally, contrary to their explicitly international character, the PICC are used in similar intensity in domestic and international situations.

III. The PICC as a global background law

The PICC serve more as an objective law than as an object of choice. They are used more by officials—judges and legislators—than by private parties or in privatized adjudication. They are treated not as a code, much less as a legal system, and instead as a compendium of individual provisions, in combination with other legal texts. And their main role lies not in international, but, rather, in domestic, law. What does this say about their legal nature? And what does it say about the state of global law?

[61] Decreto-Ley no 304/2012 (1 November 2012) 'De la contratación económica' (2012) 62 Gaceta oficial de la República de Cuba; L Dávalos Léon, 'El contrato internacional en la nueva Ley cubana de Contratación Económica' (2013) 26 Revista electrónica de estudios internaconales <http://www.reei.org/index.php/revista/num26/notas/contrato-internacional-nueva-ley-cubana-contratacion-economica> accessed 21 October 2014.

1. The idea of a background law

The PICC are frequently compared to the *lex mercatoria*, the (alleged) non-State legal order of transnational commerce, existing outside of States and created by merchants, not legislators.[62] However, this position has never been very convincing. The PICC resemble a *lex mercatoria* neither substantively (they are derived mostly from domestic and international law, hardly at all from practice) nor formally (they are a codification, while it is crucial for the *lex mercatoria* to remain uncodified).[63] At most, they can replace the *lex mercatoria* as a non-State law that is more easily applicable, but the rarity with which parties choose them suggests that this role is not important. More importantly, for the comparison to hold, we should see the PICC being applied as an alternative to State law, not, as they really are used, as a supplement.[64]

In reality, the PICC should be viewed not as a new *lex mercatoria* but, instead, as linked to a new *ius commune*, modelled on the old *ius commune*, the common law of continental Europe prior to the codification and nationalization of private law[65] or the common law prior to the twentieth century.[66] Formally, the foundation of these common laws lay not in legislative law-making but, rather, in scholarship (as concerns the *ius commune*). What characterized these laws was not so much their common substance, as their common vocabulary. This is certainly true for the continental *ius commune*, but it can also be said about the common law—different jurisdictions differed in their views about contributory versus compensatory. As such, these common laws provided the background for scholarship, adjudication, and local law-making.

Like *ius commune* and common law, the PICC serve as a global background law. They are not the applicable law in adjudication, and they are not incorporated, fully-fledged, into new legislation. However, we find, more and more, that judges and legislators justify their decisions against a global consensus (whether imagined or real) that they find, amongst others, in the PICC. It is not (yet?) the case that recourse must be had to the PICC to understand domestic law decisions. However, the PICC are becoming, more and more, a sort of general benchmark against which legal arguments take place.

This role of a background law is far from unimportant. A background law serves as residual law—it applies if and insofar as the foreground law does not provide an answer. But this is not its only role. In addition, a background law provides the

[62] See discussion with references and doubts in Michaels (n 4) para 79.

[63] Celia Wasserstein Fassberg, 'Hoist with Its Own Petard' (2004) 5 *Chicago Journal of International Law* 67, 79–82.

[64] A separate matter is whether the *lex mercatora* itself is a law existing outside of States and not rather, as I suggest, an amalgam of State and non-State laws. R Michaels, 'The True Lex Mercatoria: Private Law beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447; see also J Basedow, 'The State's Private Law and the Economy: Commercial Law as an Amalgam of Public and Private Law-Making' (2008) 56 *American Journal of Comparative Law* 703; also in N Jansen and R Michaels (eds), *Beyond the State: Rethinking Private Law* (Mohr 2008) 281.

[65] See already Michaels (n 5) 884–5.

[66] For comparison, see HP Glenn, *Common Laws* (OUP 2005).

background against which foreground law is interpreted. Since foreground law cannot be interpreted on its own terms, it must be understood against the background law. Moreover, a background law properly understood provides the framework within which foreground law functions—its structure and, so to speak, its language and its grammar.

2. *Background law and statutes*[67]

Like the PICC, neither ius commune nor common law ever represented the entirety of private law. *The ius commune*—this largely scholarly law—was interspersed by statutes, according to Helmut Coing 'like isolated little islands in the sea'.[68] Many of these statutes were specific interventions. They implemented specific policy goals specifically against the content of the *ius commune* and were interpreted with these goals in mind. Other local statutes were more in alignment with the *ius commune*; their goal was to provide certainty on rules of traditional private law with no additional instrumentalist goals. In both cases, however, the *ius commune* functioned as the background law against which statutes were drawn. Although statutes trumped the *ius commune*, their interpretation was a matter of *ius commune*, and they were interpreted narrowly—not necessarily because of the judicial desire to minimize legislative restriction to the common law, but more because they were thought to represent specific policy choices, not generalizable principles.

Like the *ius commune*, the common law was interspersed by statutes. In fact, the image of statutes as islands in an ocean of common law originates with Jeremy Bentham,[69] and it has since been repeated by others.[70] Statutes have traditionally been viewed as instrumental in nature, which was reflected in their interpretation. Few attempts were made to integrate statutes into a broader system of common law.[71] Further, ideas on the relation resemble those in the *ius commune*. Thus, on the one hand, statutes trump the common law; the idea of the judicial review of

[67] The argument in this section draws on R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Bronwnsword, L Niglia, and HW Micklits (eds), *Foundations of European Private Law* (Hart 2011) 139.

[68] H Coing, 'Zur Auslegung von Rezeptionsgesetzen. Fichards Noten zur Frankfurter Rezeption von 1509' (1936) 56 Zeitschrift für Rechtsgeschichte (Romanistische Abteilung) 269, 276, cited in R Zimmermann, 'Statuta sunt stricte interpretanda? Statutes and the Common Law: A Continental Perspective' (1997) 56 *Cambridge Law Journal* 315, 317; a similar expression is used (but with doubts as to its attraction for French lawyers) by MS Amos, 'The Interpretation of Statutes' (1934) 5 *Cambridge Law Journal* 163, 173.

[69] J Bentham, *Of Laws in General* (Athlone Press 1970) 120: 'the several efficient laws appear . . . like islands and continents projecting out of the ocean'. Bentham, remarkably, understood 'laws' to combine both statutes and precedent, both of which he thought could interfere with an assumed pre-legal or non-legal general liberty. His opposition to the common law, and support of codification, was directed in part against this character of judge-made law.

[70] See, eg, K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 70; J Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (Kluwer 1999) 22.

[71] See, eg, *Heydon's Case* (1584) 76 ER 637. The argument is not one of 'oil and water' or a 'legal apartheid', as suggested by J Beatson, 'Has the Common Law a Future' (1997) 56 *Cambridge Law Journal* 291, 308. It is an argument of interaction as well as distinctness.

statutes against some non-legislative standard is very limited. On the other hand, however, statutes were to be interpreted narrowly with a view to their instrumentalist character and the specific regulatory goal the legislator had in mind.

The PICC contain no rules based on specific regulatory policies and are, in this sense, purely 'private' law. Even attempts to codify a rule invalidating contracts based on corruption have failed. Regulatory policies come in from national laws through the opening clauses (*Öffnungsklauseln*) of Articles 1.4 and 3.3.1. According to Article 1.4, domestic mandatory rules remain applicable, and according to Article 3.3.1, the consequences of a breach of these rules must be derived from this law. This dual decision—to not address regulatory policies within the PICC and to refer to domestic laws for them—is wise. It reflects the fact that the PICC—like the *ius commune*—lack the democratic legitimacy that would be needed for such policy choices.

What emerges, then, is a fascinating combination between a (potentially) transnational law, namely the PICC, and (mostly) local/domestic mandatory rules drawn from domestic laws. It may be representative of a broader trend in which general private law becomes more and more global, whereas regulatory law remains within the sphere of local lawmakers.

3. Background law and codification

Now, the *ius commune* no longer exists, at least in its historical form. In continental legal systems, private law has been codified on a national basis. As a consequence, at least in principle, law is now to be derived from a code instead of the *ius commune*. Is the idea of a background law incompatible with codification? That would be fatal for my claim, given that the PICC are themselves a codification.

In reality, there are two important connections between codification and the idea of a background law. The first one is that a code itself serves as a background law of its own. Contrary to a widespread belief in comparative law, codes are not meant to be comprehensive. For example, on the same day on which the German Civil Code was passed, a number of specific private law statutes were passed alongside it but deliberately left out of the code. Such special statutes were formulated with the Code in mind, but as explicit deviations. In French law, there is a greater tendency to integrate instrumentalist statutes into the Code Civil. Yet even here, these statutes often remain distinguishable from the rest of the Code both by their numbering and their distinct regulatory style.[72] In this sense, then, the relationship between statutes and the code resembles that of statutes to the common law.

There is a second connection between codification and background law. Although codes are thought to supplant completely the pre-existing background

[72] See, eg, Articles 1386-1 to 1386-18 (product liability, based on Council Directive (EC) 85/374 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products [1985] OJ L210).

law, in reality this background law still shines through. This was not so in the early days of European codes. Although these codes, to a large extent, merely restated the pre-existing *ius commune*, judges and scholars rarely referred to the *ius commune* for purposes of interpretation. Instead, they used the new codes as a sole object of interpretation.[73] More recently, however, this exclusive focus has been opened up, and courts use comparative law in order to resolve cases before them. Judges find their codes not hermetically sealed. They pierce through them to resort to some background law that they find represented in either decisions of foreign laws or indeed the PICC. In doing so, they revive the transnational character of general principles of law, as opposed to the regulatory elements of law that are, necessarily, linked to a sovereign lawmaker.[74]

Indeed, courts thematize this transnational character of the PICC not only when they follow them but also when they do not. An example of the latter is the common law case law on the question whether pre-contractual negotiations can be used for the interpretation of contracts. The traditional position in English law was that they could not.[75] In 2005, Lord Nicholls suggested the exclusion should be changed in view of developments in the rest of the world, including the PICC. English law should not remain isolated.[76] Several courts, especially outside of England, invoked the PICC in favour of a change to the exclusionary rule. When the House of Lords, in 2009, rejected this change, it did so with the suggestion that Article 4.3 of the PICC is not representative of general contract law but, rather, reflects, specifically, 'French philosophy of contractual interpretation, which is altogether different from that of English law.'[77] This may or may not be so.[78] What matters here is the implicit suggestion that the PICC could serve as a relevant background law if they represented a general consensus, but not if they are incompatible with the specifics of the judge's own law, which trumps.

4. The PICC as restatement

The PICC have a lot in common with the *ius comune*. Both are transnational. Both serve as background laws. Both provide not so much the substance of individual

[73] An exception is California, where the Civil Code played hardly any role because it was largely considered to be a mere restatement of the common law. See Maurice E Harrison, 'The First Half-Century of the California Civil Code' (1922) 10 *California Law Review* 185, 189–93; see also Izhak Englard, '*Li v Yellow Cab Co*: A Belated and Inglorious Centennial of the California Civil Code' (1977) 75 *California Law Review* 4.

[74] See Michaels (n 67).

[75] *Prenn v Simmonds* [1971] 1 WLR 1381.

[76] Lord Nicholls of Birkenhead. 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577.

[77] *Chartbrook Ltd v Persimmon Homes Ltd & Ors* [2009] UKHL 38 (1 July 2009) 39.

[78] For a critique of a relevant distinction between French and English law here, see S Vogenauer, 'Interpretation of Contracts: Concluding Comparative Observations' in A Burrows and E Peel (eds), *Contract Terms* (OUP 2007) 123 at 127, 129. In defence of the House of Lords, see Lord Hope of Craighead, 'The Role of the Judge in Developing Contract Law' (2011) 15(1) *Jersey and Guernsey Law Review* 6.

decisions as a common grammar and structure. But there are also important differences. One of the more significant differences is that the PICC are themselves a code, whereas the *ius commune* was a common law that was based, and only in part, on a sort of code, namely the Justinian Code. A second, bigger difference is that the *ius commune* was indeed comprehensive. Its substance was not coherent—different views on all kinds of legal questions existed side by side within the *ius commune*, and no institution had the final say on any question. The PICC, by contrast, are not comprehensive (as we have seen earlier), and the decisions taken by their drafters stand in competition with the decisions taken by drafters of other legal texts—the CISG, the PECL, or domestic laws. As we have seen, the PICC are almost never applied to the exclusion of other texts.

This suggests that it would be wrong to view the PICC themselves as a new *ius commune*. Instead, they must be seen as a restatement of that new *ius commune*. That the PICC are a restatement was emphasized a lot, especially in their early days. They were originally conceived as a restatement of international commercial practice more than a new *ius commune*, but in many ways that was more a marketing term than a real description. In reality, the PICC drew less on commercial practice and more on domestic contract laws (which, in turn, derive to a large extent from the old *ius commune*, as was pointed out earlier).

However, does such a new *ius commune* exist and do general principles of contract law on a global level actually exist? The authors of the PICC admitted freely that differences between existing contract laws existed and that they frequently chose one over the other on the basis of quality. In reality, it matters little whether such general contract law existed prior to the PICC or whether it took the PICC to bring one about, as long as the PICC are treated in this way.

What does matter, however, is that if the PICC are treated as a mere restatement, they are not used as a code. This explains why only individual provisions are used. It also explains why these provisions are mostly not applied because of their superior quality, although that is frequently claimed. Legislators will likely draw on those PICC provisions they find qualitatively attractive, but adjudicators can rarely choose rules based on their perceived substantive quality. Formally, the fact that they are formulated as rules makes them easily applicable and thus becomes an important reason for their authority.[79] Substantively, the reason must be that they are viewed as representative of the new *ius commune*.

IV. Consequences

Understanding the PICC as a global background law is not merely of theoretical interest. Instead, the insight helps answer several practical questions concerning the role the PICC should play today.

[79] Jansen (n 5) 132–4.

1. The PICC as applicable law chosen by the parties?

First, should the PICC be made available as the applicable law in the sense of private international law? This has been a major project since their beginning, supported by countless scholarly articles and a number of legislative proposals. In Europe, a draft for the Rome I Regulation had provided for the choice of non-State law—the final text enables the choice of the PICC only through incorporation.[80] The new Hague Principles now provide explicitly for the choice of 'rules of law' (which is meant to include the PICC), but whether they will be influential remains to be seen.[81] As of now, the PICC can be chosen for sure only under the law of Oregon, but no pertinent case is known.[82]

Given the lack of interest shown by parties, this question hardly seems relevant. As a matter of fact, the PICC are simply not a very good object for choice. They are not a full codification, much less a legal order; they are 'rules of law,' not 'law'. Even within their area, the law of contracts, they are incomplete in two important regards. First, the PICC contain no rules on specific contracts. They are like the PECL and the Common European Sales Law[83] (CESL), confined to rules of general contract law. Second, the PICC contain opening clauses for the entry of State national law, in particular its mandatory rules (Articles 1.4 and 3.3.1). And they make it clear that matters not expressly settled within them must, in the last resort, be resolved by State law (Article 1.6, comment 4). This means, on the one hand, that the parties will not be able to select, in the PICC, rules catered specifically to their specific contracts. And it means, on the other hand, that precisely those rules they most want to avoid through their choice remain applicable. With these restrictions, the PICC, as chosen law, can have only a supplementary character—they supplement not only the explicit contract terms but also additional relevant rules on specific contracts (for example, the CISG) and mandatory rules from domestic and international law.[84]

This result is actually not surprising. Recall that one main goal of the PICC was to overcome the uncertainties involved in choice of law.[85] The goal was not, thus, to add yet another law to the number of laws that can be chosen but, instead, to make such a choice dispensable altogether. Put differently, the point was not to raise the number of eligible laws (which would be attractive for a competition of

[80] Council Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177 recital 13; ZS Tang, 'Non-State Law in Party Autonomy: A European Perspective' (2012) 5 International Journal of Private Law 22.

[81] See R Michaels, 'Non-State Law in the Hague Principles on Choice of Law in International Commercial Contracts' in Kai Purnhagen and Peter Rott (eds), *Varieties of European Economic Law and Regulation: Essays in Honour of Hans Micklitz* (Springer 2014) 43.

[82] Michaels (n 4) para 70 with references.

[83] *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, Doc COM(2011) 635 final [CESL].

[84] For consequences concerning a choice of law clause, see Michaels (n 4) paras 52–7.

[85] Bonell, *An International Restatement of Contract Law* (n 11 above) 13.

legal orders)[86] but, instead, to establish a common core of the existing contract laws. Their nature as a restatement is an additional good reason for why they are rarely chosen as the applicable law—US restatements, the inspiration for this nature, are never chosen as applicable law either.

2. *The PICC as applicable law absent a choice?*

Arguably, the focus on choice of the PICC has overshadowed a potentially more important role the PICC could play, namely as the applicable law in the absence of a party choice. In principle, this role is excluded in current private international law.[87] The Governing Council of UNIDROIT, consequently, had rejected a comparable express function of the PICC in their original version.[88] It was introduced into the preamble in 2004 after encouraging experiences in arbitral practice.[89] Indeed, State choice of law regimes do not allow for application of the PICC as objective contract law.[90] The situation is different in arbitration, where the arbitrator is not bound to the ordinary State choice-of-law rules but can, instead, through '*voie directe*', determine the applicable legal rules. This is so at least when the relevant arbitral law speaks of 'rules of law' and not, for example, as in Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration, of 'law'.[91]

However, the notion 'rules of law' already makes it clear that the PICC, when they are applicable, apply as individual rules, not as a whole legal order. Indeed, what we see in practice is that even if arbitrators apply the PICC, they rarely do so to the exclusion of other law.[92] The application of 'rules of law' in arbitration resembles more a general argument inspired by legal rules from different origins than the true application of one law. Here, the role of the PICC is that of a background law whose rules are used individually. Doctrinally, this is a matter less of application in the sense of paragraphs 2–4 of the preamble and more of construction and supplementation in the sense of paragraphs 5–6.

Arguably, when the PICC are used—by adjudicators and legislators alike—they are used as a restatement, in line with their original designation. Recall that the US Restatement of the Law, the model of restatements, is never even considered as an object of party choice.[93] If it is applicable at all, then it is not because parties choose it but, rather, because adjudicators consider it adequate. At the same time,

[86] EA O'Hara and LE Ribstein, *The Law Market* (OUP 2009); H Eidenmüller (ed), Regulatory Competition in Contract Law and Dispute Resolution (Beck, Hart, Nomos 2013).

[87] Michaels (n 4) paras 85–97.

[88] UNIDROIT, *Principles of International Commercial Contracts* (Transnational 1993) 19, s 22 <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994> accessed 21 October 2014.

[89] Bonell (n 86) 200, n 78, with reference to UNIDROIT (n 9) paras 604–9.

[90] n 87 above.

[91] Scherer (n 4) at para 4; cf Bonell (n 11 above) 212–18. UNCITRAL Model Law on International Commercial Arbitration 24 ILM 1302 (1985).

[92] Jolivet (n 23) 136–8.

[93] Oser (n 32) 14–16; cf Ralf Michaels, 'Restatements' in Jürgen Basedow et al (eds), Max Planck Encyclopedia of European Private Law (2012) 1466.

the Restatement is applicable not as an alternative of the law of any particular State but, instead, within the framework of that law, as a solution that resembles that of State law or, where State law has a gap, provides a convincing filler for that gap. In other words, the law function of the Restatement is a consequence of its restatement function in the narrow sense (its ability to adequately depict existing law) and its model function (its substantive quality), not in isolation from those.

Nonetheless, it seems not inconceivable to allow for a more prominent role for the PICC in the absence of party choice. One of their models, the CISG, does indeed apply automatically unless the parties choose a different law. The PICC could, in theory, be given a similar status by choice-of-law rules. I show elsewhere how such applicability would be justifiable, at least theoretically, under US principles of choice of law.[94] The same should be possible under traditional European choice of law.

Notably, the PICC could not be the applicable law at large, simply because they are not comprehensive. However, their role as an objective background law could be acknowledged. Such a role was formulated explicitly in Article 9(2)(2) of the Mexico Convention.[95] It runs against traditional private international law, which distinguishes neatly between private international law rules that designate the applicable law and substantive law that is provided exclusively by domestic law. But breaking up this neat distinction, at least in part, would respond to the insight that courts already go beyond domestic law and refer to transnational principles such as the PICC.

3. *Applicability of the PICC to interpret the CISG*

Recognizing the PICC as a restatement of the new *ius commune* also helps assess the question whether they can be used to interpret the CISG or other international conventions. Such use was one of the main aims of the PICC from the beginning, and there has been disappointment about the rather lukewarm reception.

Two arguments against such use can be dispensed with from the outset. The first is the suggestion that the CISG must, according to Article 7(1), be interpreted autonomously. What this means, properly said, is only that the CISG, as an international instrument, must be interpreted without reference to one particular legal system. Obviously, it does not rule out the use of other materials, such as judicial and scholarly opinions. And for the same reason, it cannot mean that the use of a text such as the PICC is ruled out, which serves similar purposes.

The second ill-fated argument, which can be found frequently, is that the PICC cannot be the 'Principles underlying the CISG', as referenced in Article 7(2) of the PICC, because they did not exist when the CISG was drafted. What did exist then, however, were general principles of contract law. And to the extent that the PICC

[94] Michaels (n 5) 880–3.

[95] '[The Court] shall also take into account the general principles of international commercial law recognized by international organizations.' Inter-American Convention on the Law Applicable to International Contracts 33 ILM 732 (1994).

restate these general principles, it is unproblematic to view them as the principles in Article 7(2).

This does not mean, however, that the PICC can be used in their entirety.[96] Instead, they become a repertory of possible solutions, and their use for interpretation of the CISG, just like their use in other regards, must be determined provision by provision.[97] Some provisions should be useable without big problems because they do indeed restate common principles of general contract law. Examples include the calculation of damages (Articles 7.4.2 and 7.4.3 of the PICC)[98] and the definition of standard terms in Article 2.1.19 of the PICC.[99]

Arguably, one can go even further. One example where the PICC could be used, in my opinion, is the issue of calculation of interests.[100] This was left open in Article 78 of the CISG because treaty parties were unable to agree.[101] Consequently, the majority's view is that this question must therefore be answered with reference to domestic law.[102] However, the disagreement many decades ago was due to governmental policies at the time, now long discarded, that interest rates as damages had to be kept artificially below actual market rates. Today, Article 7.4.9 of the PICC formulates a rule that represents something close to an international consensus and is thus certainly more appropriate than the rule of any one domestic law.[103]

At the same time, because the PICC formulate rules of general contract law, some of their rules are not well suited to the CISG.[104] One example of a rule that does not fit well is the provision on hardship (Articles 6.2.2 and 6.2.3 of the PICC).

[96] Such general use was rejected by UNCITRAL, *Report of the UN Commission on International Trade Law*, 46th Session, UN Doc A/68/17 (8–26 July 2013), ORGA, 68th Session, Supplement No 17 (2013) para 253; see also Sorieul, Hatcher, and Emery (n 57) 494.

[97] See the detailed analysis in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007).

[98] See especially CISG-AC, *Opinion no 6: Calculation of Damages under CISG Article 74* (2006) paras 1.2, 1.7., 3.4, 3.9, 3.14, 3.19, 7.2, 9.2 (Articles 7.4.2, 7.4.3); but cf the cautious remarks of the rapporteur of the opinion, JY Gotanda, 'Using the UNIDROIT Principles to Fill Gaps in the CISG' in D Saidov and R Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart 2008) 107).

[99] CISG-AC, *Opinion no 13: Inclusion of Standard Terms under the CISG* (2013) para 6 (Article 2.1.19).

[100] Ewan McKendrick, 'Article 7.4.9' in Vogenauer (n 4) 1–3; UP Gruber, *Methoden des internationalen Einheitsrechts* (Mohr 2004) 302–6; JY Gotanda, 'Using the UNIDROIT Principles to Fill Gaps in the CISG' in D Saidov and R Cunnington (n 98 above) 107.

[101] Florian Faust, 'Zinsen bei Zahlungsverzug' (2004) 68 RabelsZ 511, 515–16.

[102] Comparative overview of court practice in U Drobnig, 'Der Zinssatz bei internationalen Handelsgeschäften, insbesondere Kaufverträgen: Die Praxis der Gerichte und Schiedsgerichte' (2012) 62 Zbornik Pravnog fakulteta u Zagreb 535; see also Klaus Bacher, Art 74 in P Schlechtriem and I Schwenzer, *Commentary on the UN Convention on the International Sale of Goods (CISG)* (OUP, 3rd edn 2010) para 27 with references. For critique, see, eg, JY Gotanda, 'When Recessions Create Windfalls: The Problems of Using Domestic Law to Fix Interest Rates under Article 78 CISG' (2009) 13 *Vindobona Journal of International Commercial Law and Arbitration* 229.

[103] For support of this solution in arbitration, see the references in Drobnig (n 104) 558.

[104] Cf MJ Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1, 17–18.

These rules are useful for long-term contracts and changed circumstances. By contrast, the typical sales contract, as governed by the CISG, is a one-off transaction that would be severely impaired if it stood under a general hardship exception.

4. Relationship with other non-state codifications

How do the PICC relate to other transnational texts, whether non-State (like the PECL or the newer recent projects from Latin America and Asia) or treaties such as the CISG outside of their scope of application? Does not the fact that several such codifications exist and differ in detail demonstrate that general principles of contract law do not exist on a global level? This would be a valid criticism against the claim that the PICC represent the substance of existing principles.

One can well argue that we are observing an overkill of transnational texts,[105] but this is a problem only of redundancy, not actual conflict. This is so because the PICC are no more than a restatement of these general principles—as are, to various degrees, the other codes mentioned. Different non-State codes stand in a similar relation to each other as do different treatises on the *ius commune*—they rest on the same materials and aim at correctness, but none of them can claim ultimate authority. Both courts and legislators appear to perceive this issue when they refer to the PICC side by side with other non-State texts and even domestic legal texts. They look at these texts in an attempt to assess which view is more widespread and more convincing, instead of applying one at the expense of the other.

5. A global commercial code?

Finally, we find an answer to discussions on a global commercial code. Recently, a proposal for the drafting of such a code has been made to UNCITRAL by the Swiss delegation to that organization.[106] Most delegations were critical, suggesting that there was no need for such a project, it would be too costly and chances of success were small.[107] Some suggested especially that it would make little sense to duplicate efforts by negotiating a new instrument that would essentially cover the same ground as the PICC.[108] And, indeed, it has been proposed that the PICC

[105] Vogenauer, 'Common Frame of Reference' (n 5). More positive is AJ Wulf, *Institutional Competition between Optional Codes in European Contract Law* (Springer 2014).

[106] See n 57 earlier above.

[107] Discussion in *Report of UN Commission on International Trade*, 45th Session, UN Doc A/67/17 (25 June–6 July 2012) paras 127–32, For the US delegation, see Loken (n 58); MJ Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' (2014) 19 *Uniform Law Review* 114. Similarly HD Gabriel, 'UNIDROIT Principles as a Source for Global Sales Law' (n 53 above), 663–6.

[108] Loken (n 58) 514; A Veneziano, 'The Soft Law Approach to Unification of International Commercial Contract Law: Future Perspectives in Light of UNIDROIT's Experience' (2013) 58 *Villanova Law Review* 521, 526–7; P Perales Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' (2013) 58 *Villanova Law Review* 733; Dennis (n 109) 7; slightly differently Schwenzer (n 108) 730.

themselves should be transformed or at least incorporated into such a code—either as a model code[109] or as a binding text.[110]

Now, experience with the PICC suggests that a binding code is neither necessary nor desirable. The function of a global commercial code would be to provide a general background law for the existing specific contract law instruments. This function is already performed today by the PICC.[111] The big advantage of the PICC over a treaty is not that they can be changed more easily (in the twenty years of existence, very little has been changed)[112] but, rather, that, due to their non-binding character, adjudicators can draw on those provisions they deem attractive and leave out the others.

Ole Lando has argued against the use of the PICC as a background law on formal grounds. For him, 'the mating of binding rules of the specific contracts and non-binding rules of the general contract law . . . will produce a strange hybrid.'[113] In reality, such a hybrid is no anomaly at all. It constitutes the situation of law both on a national and a transnational level. The foreground is filled by explicit legislation and case law, but all of this must be understood against a background law that is frequently uncodified, not even always binding, and nonetheless necessary.

V. Conclusion

My suggestion has been that the PICC are, in fact, playing the role of a global background law. This suggestion is in contrast with much of the scholarship that views the PICC as something other—a non-State law, a legal order, a comprehensive code, a new *lex mercatoria*, and so on. It is in accordance, however, with the original purposes of the PICC. When the PICC were drafted, they were drafted as a restatement of global contract law, with no direct view to actual application.

This is actually in tune with the general role of restatements.[114] Restatements reformulate and order the existing law, but they do not strive for application, and their comprehensiveness is only formal. When restatements are most successful, they are so as background law—they come to shape adjudication and legislation, while, as non-binding law, always remaining hierarchically subordinate to them. The PICC have not been very successful in uses that are independent of their role as a restatement, but they have successfully established themselves as a global background law. That is not a small achievement at all.

[109] MJ Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 *American Journal of Comparative Law* 1, 16.

[110] O Lando, 'The CISG and the Unidroit Principles in a Global Commercial Code' in PH Delvaux and others (eds), *Mélanges offerts à Marcel Fontaine* (Larcier 2003) 451; O Lando, 'A Global Commercial Code' [2004] Recht der internationalen Wirtschaft 161; O Lando, 'A Vision of a Future World Contract Law: Impact of European and Unidroit Contract Principles' (2004) *UCC Law Journal* 3; O Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law' (2005) 53 *American Journal of Comparative Law* 379; Unidroit (n 9) para 13 (Lando).

[111] HD Gabriel, 'Unidroit Principles as a Source for Global Sales Law' (n 53 above).

[112] Gabriel (n 53 above) 667–72.

[113] Bonell and Lando (n 5) 15 (Lando).

[114] Michaels (n 95).